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13
14 UNITED STATES BANKRUPTCY COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO DIVISION

17 In re
18 METAWISE GROUP, INC.,
19 DRACO RESOURCES, INC.,
20
21 Debtors.

22 Case Nos. 14-31652-DM
23 14-31654-DM
24 (Jointly Administered)

25 Chapter 11

26 **MOTION TO EXTEND TIME TO
27 ASSUME OR REJECT UNEXPIRED
28 LEASES OF NONRESIDENTIAL REAL
PROPERTY**

29 Judge: Hon. Dennis Montali

30 **TENTATIVE HEARING DATE:**

31 Date: April 17, 2015
32 Time: 10:00 a.m.
33 Place: 235 Pine Street
34 19th Floor
35 San Francisco, California

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2 **I. JURISDICTION**

3 On November 13, 2014, Draco and Metawise filed voluntary petitions under Chapter 11 of
4 the Bankruptcy Code. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157
5 and 1334(a). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The subject matter of the
6 Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The statutory
7 predicates for the relief requested herein is provided by § 365(d)(4)(B) of the Bankruptcy Code.

8 **II. BACKGROUND AND FACTS**

9 **A. Background**

10 Metawise Group is a California corporation duly organized under the laws of the state and
11 was incorporated on or about February 25, 1997. Draco was formed in 2013, to act as the sales
12 broker and operating company for the business. Since the formation of Draco, the Debtor
13 companies together make up one integrated business. The Debtors are an international trading
14 company specializing in the procurement and supply of key raw materials for the global steel
15 industry and recycled material such as plastic, paper, and scrap metal. The Debtors have
16 customers all over the globe, with many important and close relationships with high profile
17 companies in the Chinese steel industry.

18 In early 2010, Metawise entered into a purchase and sale agreement with Greenfield
19 Multistate Trust (“Greenfield”) for the purchase of “iron ore fines.” Greenfield is the trustee of a
20 former titanium mining facility located in Theodore, Alabama (the “Alabama Facility”). The
21 Alabama Facility has approximately five million tons of iron ore fines that are the byproduct of
22 titanium extraction. These iron ore fines are an ideal iron source for steel makers in China.
23 Metawise agreed to pay Greenfield for the right to remove the iron ore fines, with the intent of
24 shipping them to customers in China. The agreement with Greenfield is currently scheduled to
25 expire in March 2015. This project is the Debtors’ only current operation.

26 The project at the Alabama Facility has been largely halted as a result of various issues
27 with the initial shipment of material and subsequent disputes with the Debtors’ general contractor,
28 Performance Environmental Services, Inc. dba Eagle-SWS (“SWS”).

1 The contract with Greenfield is the largest asset involved in these cases and Metawise
2 spent more than \$25 million in its initial efforts to get the project up and running and efforts to get
3 it back on track since the first failed effort to transport materials. This was funded through
4 prepayments by customers for the iron ore fines to be delivered. These prepayments were used as
5 the necessary capital and financing to fund the project, as is standard in this industry.
6 Unfortunately, because of the issues with its contractor, the Debtors were unable to deliver the
7 iron ore fines. As a result, these pre-paid customers are Metawise's largest creditors, collectively
8 holding claims of approximately \$30 million. Draco's primary creditors are a small number of
9 consultants involved in more recent shipment of iron ore fines in early 2014.

10 A fuller presentation of the Debtors' background, the circumstances which led to the
11 instant Chapter 11 filing, and the Debtors' expectations regarding their reorganization is set forth
12 in the DECLARATION OF SONGQIANG CHEN IN SUPPORT OF INITIAL MOTIONS filed on December 9,
13 2014 [docket no. 24] (the "Initial Declaration").

14 The Debtors anticipate that the customers will be supportive of its efforts to reorganize in
15 bankruptcy because it is their only hope to receive anything on account of the money they have
16 already paid. If the Alabama project is not restarted, the customers will not receive any of the
17 product they paid for and the Debtors have no money to repay these customers.

18 **B. Intended Reorganization**

19 Bankruptcy was the only realistic option for the Debtors to control the process and ensure
20 that the collection efforts of SWS do not cause the companies to implode. Bankruptcy will allow
21 the Debtors the space to raise the necessary capital to provide a reasonable basis to negotiate with
22 Greenfield for an extension of the contract.

23 The essential steps to a successful reorganization are finalizing agreements to raise the
24 necessary capital to fund restarting the Alabama project, and reaching agreement with Greenfield
25 for an extension of the Greenfield contract. The Debtors have also been engaged in discussions
26 with Greenfield regarding an extension of the contract for removal of the iron ore fines. The
27 Debtors believe that the success of these negotiations will largely turn on the Debtors' ability to
28 demonstrate funding sufficient to restart the shipments.

1 Prior to the filing of the bankruptcy cases, the Debtors had reached an agreement with a
2 potential investor, Armco Metals Holding, Inc., a publicly traded Nevada corporation. Although
3 the agreement was subject to approval of Armco's shareholders, the general structure involved an
4 exchange of approximately 31% of the ownership of Draco for approximately 20% of the shares
5 of Armco, which could then be used as security to raise the necessary funds for the Debtors'
6 operations. It is the Debtors' understanding that Armco is still willing to enter into a similar
7 agreement in connection with a Chapter 11 plan, provided the pending creditor issues can be
8 resolved quickly through the bankruptcy process. The Debtors believe that an agreement with
9 Armco presents the best opportunity for obtaining the necessary financing, and have been engaged
10 in discussions with Armco during the course of the case. The Debtors are optimistic that these
11 discussions will lead to a concrete proposal within the next few weeks.

12 The outcome of the case will turn on whether the Debtors are able to restart the Alabama
13 project and start shipping iron ore. Once the project is restarted, the companies can begin
14 delivering qualified material to customers that have prepaid for it. Once the Alabama project has
15 been restarted and material is being shipped, the Debtors believe that they will be able to find
16 additional new customers to purchase more of the material. These revenues will be used to sustain
17 operations and to fund payments to creditors. Unless this can be accomplished, there are simply
18 no assets that could be used to generate any material return to creditors.

19 It is essential that this case proceed quickly over the next few months. A successful
20 reorganization will require that the Debtors present a plan that incorporates both a transaction to
21 provide funding and an extension of the Greenfield contract within a matter of a few months. The
22 Debtors expect to propose a plan of reorganization within the next two to three months, which will
23 provide for substantial payments to all creditors over a period of perhaps five years, funded from
24 revenues generate through sale of iron ore fines from the Alabama project.

25 **C. The Lease**

26 Metawise and Draco lease space for their offices in Foster City, California. The office
27 space was originally leased from the Marin County Employee's Retirement Association as
28 landlord, but the building was recently acquired by DWF IV Century Plaza, LLC (collectively, the

1 "Landlord"). The Landlord and Metawise first entered into the Lease on January 16, 2003. The
2 Lease was subsequently amended a number of times. The most recent amendment (the "Sixth
3 Amendment") was entered into between the Landlord and Metawise on March 24, 2014. On June
4 10, 2014, the Landlord, Metawise, and Draco entered into an assignment agreement (the
5 "Assignment Agreement") which assigned the tenancy interest in the Lease from Metawise to
6 Draco.¹

7 Draco is a tenant of the Landlord at 1065 E. Hillsdale Blvd., Suite 318, Foster City,
8 California, 94404 (the "Premises"). The Premises consist of approximately 1,351 square feet of
9 office space. The Premises serves as the principal offices of both Draco and Metawise.

10 As provided in the Sixth Amendment, the term of the lease is through May 31, 2017. The
11 monthly rent for the Premises is \$10,802.70 per month, due on the first day of each month. The
12 Lease provides for small increases in monthly rent over time, rising to \$12,003.00 by the end of
13 the Lease term.

14 **D. The Need for an Extension of Time To Assume or Reject**

15 As set forth above, the Debtors are still pursuing negotiations regarding the critical
16 agreements necessary for a successful plan. Until more progress is made on those negotiations, it
17 is impossible to determine with any certainty whether it will be possible for the Debtors to propose
18 a feasible plan at this time. Within the next two to three months, it should be clear whether the
19 Debtors will be able to propose a plan of reorganization.

20 The current deadline (without the extension) for Draco to assume or reject the Lease under
21 the Bankruptcy Code is March 13, 2015, which is 120 days from the Petition Date. In the
22 circumstances as described above, Draco is not able to make an informed decision regarding
23 whether to assume or reject the lease at this time.

24
25
26 ¹ The Lease, as defined herein, includes the original 2003 lease and all subsequent amendments
27 and assignments. The original Lease agreement, the Sixth Amendment, and the Assignment
Agreement are all attached as exhibits to the Chen Declaration.

1 **III. AUTHORITY FOR RELIEF REQUESTED**

2 A debtor in possession has 120 days from the petition date to assume or reject a lease of
3 nonresidential real property under which the debtor is the lessee. 11 U.S.C. § 365(d)(4)(A).
4 However, this deadline may be extended by 90 days “for cause.” 11 U.S.C. § 365(d)(4)(B)(i).

5 The statute does not specify the grounds sufficient to constitute cause for an extension of
6 time. As is typical when the Bankruptcy Code provides for relief in this manner, the courts look
7 to the totality of the circumstances to determine whether relief should be granted. Courts have
8 considered a variety of factors in making the determination. These factors include: (i) whether the
9 lease is a primary asset of the estate; (ii) potential prejudice to the landlord from noncompensable
10 damages; (iii) whether the landlord would receive a windfall; (iv) whether the case is unusually
11 large or complex; (v) whether the trustee or debtor in possession has had a reasonable period of
12 time to analyze the estate and formulate a reorganization plan. *See In re Victoria Station Inc.*, 88
13 B.R. 231, 236 n. 7 (B.A.P. 9th Cir. 1988) *aff'd*, 875 F.2d 1380 (9th Cir. 1989); *In re Ernst Home*
14 *Ctr., Inc.*, 221 B.R. 243, 253 (B.A.P. 9th Cir. 1998); *In re Muir Training Technologies, Inc.*, 120
15 B.R. 154, 158 (Bankr. S.D. Cal. 1990); *see also* 3 *Collier On Bankruptcy* § 365.04[3][f] (Alan N.
16 Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

17 The Lease is a significant asset of the Draco's bankruptcy estate. The Premises are the
18 principal offices of both Draco and Metawise, and any disruption of the Lease could potentially
19 hamper the reorganization efforts of both Debtors. Because bankruptcy courts are courts of
20 equity, they are compelled to disfavor a lease forfeiture that would imperil the debtor's
21 reorganization and impede rehabilitative goals. *In re Victoria Station Inc.*, 840 F.2d at 684. Here,
22 a premature rejection of the Lease could potentially oust both Debtors from the Premises and
23 severely impede their reorganization.

24 The Landlord will suffer no noncompensable damages for this extension of the deadline
25 under section 365(d)(4). The Premises is a generic office space, and extension of the time to
26 assume or reject the lease will not create any noncompensable damages. If the Lease is ultimately
27 assumed, the Landlord would be entitled to all of the relief afforded by section 365(b), including
28 the payment of any amounts due under the lease prior to the petition date and any pecuniary losses

1 suffered postpetition. *See In re Ernst Home Ctr.*, 221 B.R. at 256. The Landlord whose lease was
2 rejected would have the right to assert an unsecured claim for damages against the estate and
3 would share in the distribution of funds. *See id.*

The most compelling reason for extending the time for Draco to assume or reject the Lease is that both Debtors are still working with other parties to determine their options in bankruptcy at this moment. The Debtors are currently involved in complex negotiations with Greenfield and with Armco, which will determine whether a plan of reorganization will be feasible. If these negotiations result in agreements necessary to propose a feasible reorganization, Draco will most likely assume the Lease. If plans of reorganization are not feasible, the Draco will reject the lease. It would be detrimental to the estates of the Debtors to be unable to maintain their existing offices during this process. On the other hand, it would be highly prejudicial to the rights of creditors for Draco to be forced to assume the lease now, potentially creating a very large administrative claim in the event that the Debtors efforts are unsuccessful.

IV. CONCLUSION

WHEREFORE, Draco respectfully requests entry of an order:

- 17 1. Extending the time for Draco to assume or reject the Lease by 90 days, to and
18 including June 11, 2015; and

19 2. Granting such other and further relief as the Court deems just and proper.

21 | DATED: March 13, 2015

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